Midterm Memo – Torts Fall 2022

This memo carefully reviews the midterm exam. The purpose of this memo is to provide you with information that will help you prepare for taking the final exam and improve your test-taking skills in general.

Included in the memo are sample student answers. These answers are not perfect and each has its flaws, but taken together they represent a set of thoughtful approaches to addressing different exam questions.

Grading

For each question on the exam, students were rewarded for identifying the correct legal issues, applying the correct legal rules, and crafting thoughtful, persuasive, credible legal arguments that dealt with nuances, gaps, contradictions, and ambiguities in the law. Extra credit was occasionally awarded to answers that were particularly thoughtful and precise. Even when students identified the incorrect issues or rules, they could earn partial credit by writing strong legal arguments applying those rules.

In accordance with Loyola Law School policies, I graded each exam anonymously. To minimize bias, I also graded each question separately and randomly sorted the exams for each question.

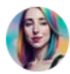
The instructions, given both at the time of the exam and provided over email and on our course website a week prior to the exam, stated that the character limit for the exam was 15,000 characters with spaces. A separate instruction stated, "Do not exceed the character or bluebook limits. Failure to comply with these limits will result in a severe loss of points." Students received credit for the first 15,000 characters of their exam answers and did not receive credit for any writing past the 15,000 character limit. Some students kept their exam notes below their answers on the exam. That was fine. These exams were not penalized for some kind of technical violation of the character count. I did not read the notes, and they did not factor into anyone's grade on the exam.

As stated in the class syllabus, the midterm exam was worth 25% of your grade in this class. The final exam will be worth 75%.

General Advice

Before diving into the individual questions on the exam, I would like to offer some big-picture feedback based on the class's exam answers as a whole. This is advice to keep in mind as you prepare for the final exam.

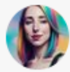
Only address the issues that matter to resolve the legal question being asked. Another law professor shared with me this tweet that I think is a helpful, pithy summation of the relationship between studying cases in class and taking a law school exam:


feLiz navidad 🎄
@LizCGil

A case you learn in class is a tool. Like a screwdriver. In class, you'll be asked all about that damn screwdriver - what color the handle is, whether it should really be a screwdriver as a matter of policy, blah blah. But on the exam, they're gonna ask you to build a table.

1:03 PM · Dec 15, 2022

37 Retweets **12** Quote Tweets **597** Likes


feLiz navidad 🎄 @LizCGil · Dec 15

Replying to @LizCGil
Keeping in mind how each hammer, nail, and screwdriver you learn about can be USED to ultimately build that table, throughout the semester, is THE key in my opinion. You will not find a single exam question that asks you what color that one screwdriver was.

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For each exam question in this class, you have a role and an assignment. You will receive credit for how well you perform on that task.

Don't include trivia. Answers were not rewarded for reciting or referencing legal rules that were unnecessary to answer the legal question in a given case. This uses up your character count and distracts the reader from what matters to decide the particular legal issue.

Just do your job. Resist the tendency to show off how much you know. You won't be rewarded for that. A busy partner at a law firm doesn't care that you have memorized a whole host of rules. She only cares that you can identify the rules that matter and use them to win the case.

Ground your argument in legal rules. You should make all of your arguments under the umbrella of a legal rule. If your answer mentions facts from the prompt, make sure that you are connecting those facts to a legal rule that makes those facts legally significant. Facts mean nothing on their own. You must show the reader why a fact matters under the governing legal rule.

Separate duty and reasonable care analysis. Whether the defendant owed the plaintiff a duty and whether the defendant breached that duty are two separate legal inquiries that follow different rules. The tools used to determine a reasonable standard of care cannot be used to determine the existence of a duty.

Abide by the character limits. For those students who lost points by exceeding the character count, this is a good lesson to learn early in your legal career. In the practice of law, word and page limits often matter. Courts will reject your brief in its entirety if it exceeds the court's word count even by one word. These

formatting requirements are no joke. A state Supreme Court once rejected a brief that I filed because I printed the cover page of the brief on the wrong color card stock.

Use this midterm exam as a learning opportunity. This exam is only worth 25% of your grade in this class. If you performed well, keep up your strong efforts. If you did not perform as well as you'd hoped, use this memo as a springboard for improvement. Read through my commentary on each question and mark out on the exam the issues that you missed. Take notes on how you would rewrite your exam if given the chance. Compare your answers to the sample student answers to understand how you can better structure your answers, string together arguments, and write more precisely and succinctly.

None of these efforts will be wasted. Our final exam will closely mirror the format of the midterm. And the final exam is cumulative, meaning that any of the topics from the midterm may reappear on the final.

Once you have taken these review steps, I am more than happy to meet with you individually (or in groups) to go over your exams. If you finish your review of this exam and still have questions about how to approach an exam for this class, this is great timing for meeting with me one-on-one so that I can understand your approach and coach you for the final. At the start of the semester, I will put a form on our class website for students to schedule one-on-one meetings with me. Depending on the number of students who request these meetings, we may need to spread them out across the first half of the semester.

Part I: Short Answer Questions

Short Answer Question #1

State law requires that grocery stores put up "Caution: Slippery When Wet!" signs immediately upon mopping areas of the store where customers are allowed to walk. A Bristol Farms supermarket employee was mopping the produce aisle and forgot to put up a "Caution: Slippery When Wet!" sign. A customer walking down the aisle slipped and fell. The customer decided to sue Bristol Farms for negligence and has retained you as counsel. What is your strongest theory for why the grocery store did not exercise reasonable care?

Prof. Doyle Commentary

The strongest theory for why the grocery store did not exercise reasonable care is that the grocery store was negligent per se. The store violated a statute whose purpose was to protect customers, and a customer was harmed in the exact manner that the statute was designed to prevent. The strongest answers to this question were precise and to the point. The most relevant case from our casebook was *Martin v. Herzog*, which many students referenced. Some students analogized to a note case, *De Haen*, which works but is not quite as on point as *Herzog*

because the statute in *De Haen* was much less clear about the harm that the statute was meant to prevent.

Some exam answers pointed to res ipsa loquitur as the strongest theory, but this is incorrect. Res ipsa loquitur almost never applies to slip and fall accidents because the injury situation does not indicate that anyone was negligent: People slip and fall all the time without it being the result of someone else's negligence. Res ipsa and negligence per se operate in opposite ways. Res ipsa finds fault by looking almost exclusively at the way that the plaintiff was injured and paying little attention to the defendant's behavior. Negligence per se finds fault by looking almost exclusively at the defendant's behavior.

Other exam answers pointed to foreseeability as the strongest theory. If a court did not find the defendant negligent per se, then foreseeability would be a useful angle for arguing that the defendant did not exercise reasonable care. But negligence per se is a stronger theory because it is more directly on point.

Other exam answers used multiple theories (custom, reasonable person standard, hand formula, etc.). There were no penalties for including other reasons why the defendant did not exercise reasonable care, but the question only required an analysis of negligence per se.

Some answers misread the legal issue as one of constructive notice or the existence of a legal duty. The background facts of this question resemble the constructive notice cases from our casebook that involved slip and fall accidents in grocery stores. But notice is not a legal issue in this case because the grocery store created the risk by mopping the floors.

Examples of strong student answers:

The strongest theory of negligence here is that the defendant violated a statute. Negligence per se is negligence as a matter of law, which is typically statutory. When there is a statute designed to prevent the type of harm that occurred, and the plaintiff is in the class of person the statute is designed to protect, then the statute applies to a negligence case.

Here, state law requires that grocery stores put up caution signs after mopping. This is a statute, like in *Martin v. Herzog*, where the court ruled that a statutory violation causing the type of harm the statute protects was a negligent act. The statute is designed so customers do not slip and hurt themselves. The defendant violated the statute by not putting up the sign after mopping, and plaintiff slipped and fell. This is the type of harm the statute is designed to prevent, and plaintiff is a customer, who the statute is meant to protect. Therefore, the defendant violated a statute, making this a negligence per se case showing that reasonable care was not met.

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Violation of a statute, by failing to put up a caution sign after mopping the floor, is the strongest theory for why the grocery store did not exercise reasonable care. Statutes can explicitly state a standard of care. For a statute to be used to prove negligence, the statute must be designed to prevent harm and the plaintiff's harm must be the kind that the statute was designed to prevent.

Here, there is a statute requiring stores to put up a caution sign after mopping the floor. This statute is designed to prevent harm that results from falling due to slippery conditions caused by mopping. The customer's harm was the exact type of harm that the statute was designed to prevent. As in *Martin*, where the plaintiff was negligent for violating a statute against driving at night without headlights that was designed to prevent car accidents, here, the defendant is negligent in violating this statute that was designed to prevent injuries from slipping and falling on mopped floors.

Therefore, violation of a statute is the strongest theory for why the grocery store did not exercise reasonable care.

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Bristol Farms is liable for my client's injuries because the store failed to exercise reasonable care as proscribed by the state law, making this case negligence per se.

When applying a statute to the question of reasonable care, courts look to whether the statute was enacted to prevent harm and what type of harm the statute aims to prevent. Here, the law required stores to place a sign warning customers of a wet floor directly after the floor has been mopped. Based on the sign's proscribed language—"Caution: Slippery When Wet!"—courts would likely find that the statute meant to prevent the harm of slipping on a wet floor, and based on the instructions to place the sign in areas where customers walk, courts would also likely find that customers slipping on the wet floor is the type of harm the statute aims to prevent.

Here, the supermarket employee failed to place the sign and my client slipped on the wet floor. Thus, the employee failed to comply with the statute and my client's harm matches the type of harm the statute aims to prevent. Bristol Farms clearly failed to act with reasonable care.

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Negligence per se is the strongest theory. When there is a statute that is designed to prevent harm, and a plaintiff is within the class of people that is meant to be protected and plaintiff suffers the harm that was meant to be prevented, the defendant may be found negligent as a matter of law by violating the statute.

Here, the law requires grocery stores to put up a sign after mopping warning customers that the floor is slippery. A BF employee failed to put the sign up after moping the floors and plaintiff slipped and fell. The harm the law means to prevent was slipping in the store and it is meant to protect store customers. plaintiff was a customer in the store and the harm plaintiff suffered was slipping. Because

BF violated the law, they can be found negligent as a matter of law under the negligence per se theory.

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Short Answer Question #2

A ninety-year-old man named Philip Swanson was sued for negligence after getting into a car accident with another driver, Marco Sanchez. In the accident, Swanson's truck struck the rear fender of the car driving in front of him on the highway. At trial, the defendant requested that the court give a jury instruction that "the defendant acted negligently only if they failed to act as a reasonably prudent elderly person would have acted under similar circumstances." Over the plaintiff's objection, the court gave this instruction to the jury; the jury returned a verdict for the defendant; and the plaintiff now appeals, arguing that the instruction was an incorrect statement of law. As an intermediate appellate court hearing this appeal, how would you rule and why?

Prof. Doyle Commentary

The issue in this case is whether the judge properly instructed the jury on the reasonable person standard. The reasonable person standard is an objective standard with some exceptions. Although youth is a recognized exception, old age is not. Therefore, the instruction was an incorrect statement of law because the court should not have included the word "elderly" in its jury instruction.

Examples of strong student answers:

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Here, the court allowed improper jury instructions and the case should be remanded for a new trial. The jury instructions were improper in their description of the reasonable person standard. When determining reasonable care, courts use the objective standard of a reasonable person and what they would or wouldn't do in the given situation. Though there are a few accepted exceptions, this objective standard doesn't take into account personal, subjective traits. Because old age isn't one of the accepted exceptions recognized by courts, it shouldn't be included in the description of a reasonable person. Here, the court erred in allowing the jury instruction to include "elderly" in the description given of a reasonable person and therefore the case should be re-tried with a new jury.

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We rule that the trial court erred in giving an improper jury instruction that incorrectly modified the standard of reasonable care under the reasonable person standard and the case should be remanded.

The reasonable person standard is an objective standard which emphasizes what a reasonably prudent person would do under similar circumstances to help prove

whether or not one failed to exercise reasonable care. Under this tool, modifications may be permitted due to physical disabilities, children doing children things, and with those with specific expertise like doctors. We do not modify this tool with old age and infirmity, mental disabilities, or children doing adult activities.

Here, it is clear that the trial court did not uphold an objective standard with their allowed jury instructions. They allowed for Swanson's old age of ninety to be an adjustment which should not be allowed because it permits the acceptance that those who are old do not need to have the same standard of reasonable care and cuts against the justifications for this standard: administrative feasibility; consistency and enforcement of community norms; and equality and fairness. Thus, the case should be remanded.

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The jury instruction was an incorrect statement of law because elderly defendants are held to the regular reasonable person standard.

The reasonable person standard is an objective standard to which defendants are held in assessing reasonable care and breach. It compares the defendant's actions to that of a fictitious reasonable person of ordinary prudence and intelligence. There are exceptions to that standard. Children doing child activities, experts, and physically disabled individuals (e.g., blind, deaf, and quadriplegics) are held to a modified reasonable person standard that accounts for these characteristics. However, elderly individuals are held to the regular reasonable person standard. Indeed, courts have been reluctant to take old age into account because it invites the possibility of bias, subjectivity, and inconsistent judgments against this class of defendants.

Here, the trial court erred in instructing the jury on the reasonable elderly person standard. Instead, they should've used the ordinary reasonable person standard. For these reasons, I would remand the case for a new trial with the instructions provided above.

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Short Answer Question #3

Penelope, an eight-year-old girl, was shopping at Target with her mother, Deanna Robbins. Robbins allowed Penelope to push the shopping cart around the store. Another customer, Melody Beasley, saw Penelope pushing the shopping cart quickly to gain speed, putting her feet on the bottom rung of the cart, and yelling, "Whee!" as she coasted down the aisles. Beasley smiled at the sight of the child enjoying herself and was unconcerned about the child's actions until — a few minutes later —Penelope crashed the cart into Beasley, breaking her leg in two places. Beasley sued Penelope for negligence; the case went to trial; and a jury returned a verdict finding the defendant not liable. Assuming that the plaintiff had proven the duty, causation, and harm elements of a negligence cause of

action, what would be the most compelling reason why the jury did not find that the defendant had breached a duty of care?

Prof. Doyle Commentary

The legal issue in this question was the standard of reasonable care for an eight-year-old pushing and playing on a shopping cart in a store. This question was more open-ended than the preceding short answer questions as you were able to consider any of the tools we discussed in class for determining the standard of reasonable care. But your analysis was still constrained because the question asks you to find the most compelling reason why the defendant *did* meet the requisite standard of care.

Students wrote strong arguments — some of which are included in examples below — that the most compelling reason is that Penelope behaved as a reasonably prudent eight-year-old. Other students addressed the issue of custom and how children are expected to ride shopping carts around stores — indeed the plaintiff was unconcerned about the child's actions until the accident happened.

Statute, foreseeability, and the hand formula do not provide as strong a justification for why the defendant met the standard of care. There's no statute in the fact pattern to rely upon. Foreseeability and the hand formula both cut against the defendant because this kind of harm was likely to happen and the burden of not riding a shopping cart with your feet off the floor is pretty low.

The question prompt asks only about breach. Some exams addressed contributory negligence, the existence of duty for Penelope, or the mother's duty to intervene, but these topics are all outside the scope of the question.

Some students mistakenly argued that the reasonable person standard either does not apply to children or does not apply to children doing childlike things. In general, courts have decided that children below the age of five cannot be found negligent. But children who are Penelope's age *can* be found negligent while engaged in childlike activity if their conduct does not conform to that of a reasonably prudent child of similar age and ability.

Examples of strong student answers:

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The most compelling reason why the Jury might not find the defendant had beached a duty of care is because the child was acting as a reasonably prudent child would. When evaluating cases of negligence, courts have often relied on the general rule that there are exceptions to a reasonable person and reasonable duty of care standard such as mental disability, children unless they are acting as adults, and experience/expertise. Children do not have the some understanding of consequences, or cognitive abilities as adults, so it is unreasonable to expect them to behave with the same degree of care as an adult. An eight year old is likely not to

understand the concept of negligence, let alone the know how to tailor her actions to avoid it. Penelope was playing on the cart, as any eight year old might be, not guiding the cart as an adult might. Although the accident that occurred is unfortunate, and Beasley surely suffered harm from her broken legs, it is not reasonable to expect Penelope as a child to exercise the same duty of care an adult might.

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The jury found for the defendant child because they held her to the standard of the reasonably prudent child, not the reasonably prudent person. As such, even though the child had a duty to the plaintiff, the child's actions of swinging around Target in a shopping cart are not outside the bounds of what reasonably prudent children do. Children are not held to the same standard of the reasonable person because they do not have the requisite level of understanding that adults do. To hold them to the same standard is unfair. However, if the child were engaging in activities adults engage in then she would be held to the same standard, presumably because if she is capable of doing adult activities, she is capable of understanding what she is doing. But swinging in a shopping cart is not an adult activity so she wasn't held to the same standard as an adult. Children swing, climb, and jump on things regularly. Adults are aware children behave this way. Even the plaintiff was aware because she herself smiled at the defendant upon seeing her and was unconcerned with her actions. The jury looked at the circumstances and determined that this is what children do and as such the child did not breach her duty of reasonable care.

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The most compelling reason why the jury didn't find that the defendant breached a duty of care is because the defendant was held to the standard of a reasonably prudent child performing child-like activities. When children are performing child-like activities, they are not held to the same "reasonably prudent person" standard of care required. This is because a child has not experienced enough to be aware of the dangers and consequences of their actions.

Here, the defendant was pushing a shopping cart around quickly. This sort of behavior is expected for children as they enjoy playing with cars and riding around and it's not unusual to see this from a child when shopping. plaintiff noted that they initially were not alarmed by the child's behavior, as they smiled and shopped. This shows that it wasn't unreasonable for the child to be acting in such a way. We must compare children’s acts to that of reasonable prudent child because they don't have the foresight to see the consequences of their actions. Because the child was doing child-like things, they were likely held to the standard of a reasonably prudent child. Under the circumstances, the child's behavior didn't fall below the standard of care. As such the jury found that the defendant hadn't breached.

Short Answer Question #4

Kenneth Moon visited his dentist, Barb Strong, to have a tooth removed. After the operation, Moon discovered that Strong had removed two of his teeth. Strong explained to Moon that she initially removed the wrong tooth, realized her mistake, and then removed the correct tooth as well. Moon sued Strong for negligence. At trial, he introduced evidence that Strong was supposed to remove one tooth and that she removed a different tooth. At the close of the plaintiff's case, Strong submitted a motion for judgment as a matter of law (also called a "directed verdict" in some jurisdictions). In the motion, Strong argues that medical malpractices cases turn on the question of custom and require expert testimony; therefore, because the plaintiff produced no expert witnesses and introduced no evidence related to customary medical practices, the plaintiff failed to make a prima facie case of negligence and the defendant is entitled to judgment as a matter of law. As a trial court judge, how do you rule on the motion and why?

Prof. Doyle Commentary

Question four is a bit tricky. Based on how the defendant has framed the issues within the motion for judgment as a matter of law, it may appear that some kind of intricate medical malpractice analysis is required. Upon closer inspection, it turns out that's not necessary. The defendant's motion should be denied because a reasonable jury does not need the help of expert testimony to determine that medical professionals removing healthy body parts by mistake constitutes negligence. The strongest answers to this question analyzed how this is a case where res ipsa loquitur applies.

Examples of strong student answers:

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The issue here is whether a reasonable jury would have legally sufficient evidence to find Strong committed medical malpractice. Strong is correct that medical malpractice cases turn on the question of custom, usually introduced by expert witnesses. This is because medical malpractice cases are often too filled with medical facts and processes for the average jury to understand. However, in cases like the one at hand, the category of res ipsa loquitur is often used because the act itself shows there was negligence and the case can be streamlined for efficiency's sake. The basic requirements are that the harm implies clear negligence, and the defendant must be in exclusive control of the instrument of harm.

Here is exactly the type of case that judges use res ipsa loquitur for, though it is usually on the plaintiff to bring this claim. It is not necessary to have expert knowledge to know that one's dentist should remove the proper tooth on the first try, and as such, the introduction of expert witnesses is unnecessary and inefficient. The fact that, due to her own error alone, Strong removed two teeth

rather than just one is enough evidence to show that she was negligent and having an expert witness come testify as much would be an undue burden. Therefore, there is sufficient evidence for a jury to find against Strong and therefore deny the defendant's motion.

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As a trial judge I would deny the dentist's motion on the grounds of Res Ipsa Loquitur.

A directed verdict is a ruling reserved for cases in which there is no legally sufficient evidentiary basis for a reasonable jury to reach a different conclusion. Res Ipsa is a bypass around the standard of reasonable care and points to the question of negligence; the two requirements are that the harm is the type from which negligence can be inferred and that the defendant was in sole control of the instrument of harm.

Here, the dentist removed a tooth by accident. This is the type of harm from which negligence can be inferred because if there was no negligence then only the proper tooth would have been removed. It is also clear that the defendant was in control of the instrument of harm because they were the only dentist operating on the plaintiff. It is true that medical malpractice cases turn on the question of custom, but this can be addressed at trial because Res Ipsa does not immediately result in a finding of negligence. Instead, it allows for negligence to still be disproven at trial. The plaintiff's case may be weaker without expert testimony but Res Ipsa is a question for the jury and they will weigh all facts. Courts will use Res Ipsa where negligence can be inferred in order to jump through unnecessary hurdles of the judicial process and to give plaintiff's a chance to argue cases with a lack of evidence. Here, the case should not be dismissed for a lack of expert testimony because testimony is a form of evidence.

I would deny the defendant's motion because Res Ipsa applies here.

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As a judge, I would deny defendant's motion as plaintiff doesn't need expert witnesses to inform of medical customs to prove medical malpractice. Expert witnesses are typically brought in to inform the judge and jury of customary medical practices used because of the lack of experience and expertise in this field. Though this is a norm, it's not required especially if the defendant wasn't using their discretion to follow a certain standard or practice. There are other ways to define the standard of care that was required. Negligence can also be proven in medical malpractice cases through the doctrine of res ipsa loquitur. Res ipsa loquitur requires that the harm that plaintiff suffered be the type where negligence can be inferred and that the defendant had exclusive control. In Ybarra, plaintiff suffered shoulder pain after having an appendectomy. Because this was an unrelated pain to the surgery plaintiff had, it could be inferred that the harm suffered resulted from negligence. Additionally, the doctors had control over plaintiff during the procedure as plaintiff was unconscious. As such, the injury plaintiff suffered could allow a reasonable jury to return a verdict in favor of the plaintiff.

Here, there is enough evidence to inform a custom without expert witnesses. It's typically not customary for dentist's to pull the incorrect tooth when performing a procedure. A reasonable jury could find that the defendant fell below the standard of care required. As a judge, I would also allow for res ipsa loquitur to apply. The type of injury here is similar to that in *Ybarra*. The harm that resulted is the type that usually only occurs when someone is negligent as dentists typically don't pull the wrong tooth unless negligent. Also, the defendant was in exclusive control of plaintiff's operation. Therefore, plaintiff could likely prove negligence through this doctrine too.

For these reasons, I would deny defendant's motions as expert witnesses aren't required to inform customary practices.

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A directed verdict should be granted if no reasonable jury could have legally sufficient evidence to find for a party on a particular issue. A prima facie case of negligence means the plaintiff has met the burden of proof on all four elements of duty, breach, causation, and harm and the case should go to a jury rather than decided through a directed verdict.

In medical malpractices cases, custom predominates because the average person needs insight into what the standard of care for a doctor is. However, when the standard is so clear that a layman would understand it without expert testimony, an expert witness is not necessary. Expert witnesses are often used because it is hard for ordinary people to decide if a doctor was negligent since they are unaware what standard of care a doctor should exercise. Although doctors are held to a higher standard, the profession as a whole sets that standard.

The defendant dentist owed her patient a duty and breached it by removing the wrong tooth and removing two teeth instead of one, causing harm to the plaintiff. Although the plaintiff provided no expert witness and did not offer any custom to prove his case, it is clear that the dentist breached the standard of reasonable care by removing two teeth instead of one. A jury does not need to hear expert testimony or be made aware of custom in how a tooth is usually removed to reach the conclusion that the dentist was negligent in performing the tooth removal.

Since the plaintiff has made a prima facie case of negligence, I deny the defendant's motion for a directed verdict.

Part II: ESSAY Questions #1 and #2

You are a junior attorney working at a plaintiff-side personal injury firm in the state of Loyola. A partner at the firm is seeking your help with a case. The facts of the case and your work assignment are detailed below.

Our client, Remi Smith, was recently injured during a hike in the mountains.

Smith has been a longtime fan of a self-help guru, Weston Watkins. For the past few years, Watkins has been promoting "The Watkins Method," a lifestyle practice that involves sleeping with crystals under your pillow at night, engaging in deep breathing exercises, taking daily ice baths, maintaining a strict legume-centered diet, and making charitable donations to Weston Watkins. According to Watkins's promotional literature, "After as little as three days of heartfelt, genuine practice of the Watkins Method, your experience of negative emotions and negative bodily sensations can drop away forever. The Watkins Method can transform you into the superhuman you always knew you were. You can be happy all of the time, endure any environmental conditions, and consciously direct your immune system to fight off disease." To promote the method and prove his ability to endure extreme conditions, Watkins has engaged in a series of publicity stunts that include climbing frozen mountains wearing only a loincloth; going without sleep, food, or water for days on end; and reading law school casebooks cover-to-cover.

For the last year, Smith has been listening to Weston Watkins's podcast. On the podcast, Watkins promotes his method and answers reader's questions. She originally listened for free, but for the last six months has been paying a $10 a month subscription fee to listen ad-free and access bonus content. At the same time that she started paying for the subscription, she also started to practice the Watkins Method in a more diligent way, buying a set of crystals (from the Watkins online store) to keep under her pillow, taking daily ice baths, practicing breathing exercises multiple times a week, and maintaining a strict legume-based diet.

A month ago, Smith paid $100 to attend a one-day "Watkins Method Retreat" at the Loyola Convention Center, where Watkins led a packed audience through the various Watkins Method techniques. At the close of the day, Watkins told the crowd, "If you practice what I've taught you today, you will transcend humanity and take the next step in our cosmic evolution. Nothing can stop you, not the icy peaks of mountains, not the deprivation of food and water, not a weighty tome of inscrutable legal concepts."

At the retreat, Smith befriended another attendee, Jason Patel. Patel was also an ardent Watkins Method practitioner and had been practicing the method for about a year. Invigorated by the retreat experience, Smith suggested that they make plans to put their practice to the test. They agreed to hike up a local mountain, Posner Peak, while practicing the Watkins breathing techniques. At this time of year, the temperatures at the Peak are below freezing. Hikers must endure violent winds, ice, and snow. Experienced hikers could expect to reach the Posner summit and return to base camp in about two days. To prove their superhuman capabilities, Smith and Patel chose to hike up the mountain wearing only swimsuits and without bringing any food or water. Neither Smith nor Patel had ever been hiking before.

The hike got off to a bad start. An hour into the trek, while navigating a narrow cliffside pass, Smith slipped, fell about fifteen feet onto a flat ledge below, suffered minor scrapes and bruises, and broke both of her legs. "Help me!" she cried out

to Patel, "I can't move my legs. I'm hurt real bad." Patel looked down at her and said, "I think you fell because you weren't breathing correctly. Try taking longer in-breaths. Boy, I wonder how you're ever going to get up this mountain now." Patel left her behind and continued his ascent.

As Smith was on an exposed ledge on the side of a cliff in subzero temperatures wearing only a bathing suit, she soon began experiencing symptoms of hypothermia.

An hour later, another hiker, Leia Yang, who was descending the mountain noticed Smith on the ledge below. Yang asked Smith if she was okay and tossed down a spare scarf. Smith wrapped the scarf around her (now-purple) fingers, and asked Yang if she would call someone for help. Yang replied that she wished she could but her cellphone was running kind of low on battery and she was in the middle of a really good podcast on the safety features of electric trolley lines at the turn of the twentieth century. Yang inserted her headphones into her ears and kept hiking down the mountain.

A half hour later, another hiker came across Smith and called the local authorities, who rescued Smith and brought her to a nearby hospital. As a result of her injuries, Smith had to have both legs and four fingers amputated. For a few months after her injury she was quite despondent. Other than the Watkins Method, her favorite hobbies had been dancing and playing guitar. She won't ever play guitar again, and her dancing will be limited to the skill she eventually develops using prosthetic limbs. The surgeries have been quite painful, and she has had extended hospital stays. Three months after the injury, her attitude began to improve dramatically, and she credits the Watkins Method for helping her let go of negative emotions and negative physical sensations.

The story of Smith's injury has gained attention in the news, and a number of people have since come forward with allegations against Weston Watkins. A few days earlier, another attendee of the Watkins retreat at the Loyola convention center suffered serious medical complications after going days without food or water to test his superhuman abilities. Two people in Oregon who had attended a different Watkins retreat died of hypothermia after attempting to climb a local mountain wearing only their underwear. Women in New York, Virginia, and Colorado have accused Watkins of sexual assault, which is both an intentional tort and a criminal act in each state.

Our firm is pursuing three different negligence claims on Smith's behalf: against Watkins, against Patel, and against Yang. We're early in the litigation process, and we'd like you to think through two potential issues ahead.

Question 1: Existence of a Duty

We anticipate that each of these defendants will move for summary judgment on the grounds that they did not owe a duty of care to the plaintiff. Please write a short memo analyzing whether each defendant owed our client a duty of care. Be sure to include the most compelling reasons for each side and your prediction

for how a trial court will rule on each defendant's motion for summary judgment. For this memo, we don't need you to analyze whether the defendants exercised reasonable care or otherwise breached their duty to the plaintiff. Confine your analysis to whether each defendant owed the plaintiff a duty of care.

Note that when it comes to affirmative duties, Loyola only recognizes the classic common law exceptions. Even though I wish we were litigating this case in a state like California that uses the *Rowland* factors, they're not applicable here.

Prof. Doyle Commentary

The first question asked you to analyze whether each of three actors in the fact pattern — Watkins, Patel, and Yang — owed the plaintiff a duty of care.

Credit was awarded for identifying the issues, articulating the rules, applying those rules to facts, and crafting thoughtful arguments and counterarguments that addressed the gaps, contradictions, and ambiguities that remained. Bonus points were awarded for arguments that were particularly thoughtful and well-organized. Students did not receive credit for analyzing whether the defendants exercised reasonable care.

Watkins

Of the three defendants, Watkins has the trickiest duty analysis. He seems particularly culpable, but his actions don't neatly align with any of the cases we've read in class or any of the rules governing the existence or non-existence of duties. The strongest answers analogized to the most relevant caselaw and tied in the justifications for the holdings in those cases to the facts of the current case.

It was worth analyzing both whether Watkins owed a duty because his general conduct created a risk of physical harm and also whether Watkins owed a duty because an affirmative duty exception applied.

Watkins's general conduct created a risk of physical harm, but it is a bit attenuated from Smith's accident. One could argue that it is like an athletic coach that has someone attempt an exercise that causes an injury. In that instance, courts would not be reluctant to find a duty. Likewise, because Watkins encouraged his followers to engage in these actions, his conduct could be said to have created the risk. But there are also strong policy reasons why a court may not impose a duty. Crushing liability and social host liability are a bit of a stretch, but it's a stretch worth making (with caveats) when that's the only material you've got. Some students made the thoughtful argument that our country is highly protective of free speech, and a court may be concerned about public speakers being held liable for the actions of people who hear their messages.

Some students brought in Section 311 of the Restatement Second of Torts from the Rules Appendix and analyzed whether Watkins knowingly gave false representations. Section 311 can be a helpful tool, but it was important for exam answers to recognize that, given the facts of the case, its application is not clearcut. From the fact pattern, we can't ascertain that Watkins was lying. While he does

seem like a charlatan, he also seems to have been able to pull off some pretty fantastical feats using his methods. It may be that he is telling the truth or is stretching the truth or is misguided himself and has not crossed a line into knowingly giving false representations.

When it comes to affirmative duty exceptions, the only exception that would potentially apply is special relationship. The strongest answers brought in the reasoning behind the rule from *Harper v. Herman*. Like the plaintiff in *Herman*, Smith was an independent adult and not a vulnerable person relying on Watkins for protection. But unlike the plaintiff in Herman, Smith had a much strong reliance interest with the Guru-Disciple dynamic, and Watkins seems much more responsible for the end result. The commercial aspect matters here as well, but doesn't settle the issue entirely.

Patel

Patel's general conduct did not create the risk of this injury as Smith independently decided to climb up the mountain and did not fall because of any situation that Patel created. So the real question is whether one of the affirmative duty exceptions applies.

Special relationship is the most relevant exception. *Farwell v. Keaton* and *Harper v. Herman* provided a host of material for students to use in their answers. Many answers addressed either Keaton or Herman, but the strongest answers addressed both cases. Compared to Keaton, Smith and Patel are more clearly co-adventurers who are in a position of relying upon one another for safety in treacherous conditions. But Keaton is also a combined "special relationship" and "undertakings" case. Patel doesn't try to help Smith at all but just leaves her behind. Some students argued that Patel's suggestion that Smith take longer in breaths counted as an undertaking. That argument was worth analyzing but ultimately will not be very convincing to a court.

The other affirmative duty exceptions do not apply. Non-negligent injury doesn't apply unless one characterizes Patel's and Smith's hike as a shared activity that caused the fall. It's a bit of a stretch and "special relationship" fits more cleanly, but students earned credit for connecting all the dots in the logic. Some students mistakenly conflated undertaking with non-negligent creation of injury. With non-negligent creation of injury, the defendant must be responsible for causing the initial injury. Although the defendant is not liable for the initial injury, that injury creates a duty of care to the plaintiff going forward.

Yang

Yang's conduct did not create the risk of this injury as she appears on scene after the injury has already happened. The only question for Yang is whether one of the affirmative duty exceptions applies. The only exception that could apply is undertaking. There are two questions worth wrestling with here. Does throwing down a scarf count as undertaking? If so, did discontinuing aid after throwing down the scarf relieve her of liability? Most students found that Yang's tossing

down a scarf counted as an undertaking, which is a stronger argument than arguing that her initial help was too small to count as an undertaking.

The crux of this issue was whether Yang's duty extended past that initial help and whether her discontinuing of aid relieved her of liability. There's not a clear answer here. The strongest answers in the class acknowledged that the law was ambiguous and contradictory and did their best to guide the reader through the thicket of what exactly Yang owed Smith. Appendix B provided some sections of the Second and Third restatements that could be helpful in this analysis. The Second Restatement expresses no opinion as to whether "an actor who has taken charge of a helpless person may be subject to liability for harm resulting from his discontinuance of the aid or protection, where by doing so he leaves the other in no worse position than when the actor took charge of him." The Third Restatement requires an actor to exercise reasonable care in discontinuing aid for someone who reasonably appears to be in imminent peril.

Yang did not leave Smith in a worse position than when she took charge of Smith. While the scarf provides only minimal protection from the cold, Yang's actions did not make Smith's position worse and did not deprive Smith of other aid that she could have received. But Yang did not abide by the Third Restatements requirement that an actor exercise reasonable care in discontinuing aid for someone who reasonably appears to be in imminent peril. If Yang's actions amounted to taking "charge of another who is helpless," then Yang did not abide by the Second Restatement's requirement that she exercise reasonable care to secure the safety of Smith while within her charge.

Examples of strong student answers:

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In order to determine the existence of duty, it must be asked whether the defendant's actions created a risk of harm. If they did, then there's a duty to exercise reasonable care unless a policy based exception has been made. In circumstances where the defendant's actions didn't create a risk of harm, there is generally no duty to intervene or mitigate the harm. Courts recognize five exceptions to this general rule: special relationship, undertaking, non-negligent creation of risk or injury, and statutes. Each of these five exceptions can create an affirmative duty requiring the defendant to intervene or mitigate harm they didn't cause. In the Remi Smith matter, the non-negligent and statutory bases for affirmative duty will not be discussed as they are not applicable based on the facts of the case.

Smith has a decent case against Watkins based on general duty of care because he encourages people to do risky things, promising that his methods will protect them. Additionally, a strong case can be made for Watkins having an affirmative duty based on the special relationship he has with Smith. This special relationship was created by monetary transactions from Smith to Watkins, and through the giving of false information as discussed in Section 311 of the Restatement. In general, there is a special relationship of duty created when parties exchange

money. Because Watkins was profiting from the relationship, he had a duty to Smith and should have known that she would act on his recommendations. Section 311 and Randi W. discuss that there is a duty not to misrepresent information when it will foreseeably lead to harm. Here, Watkins explicitly tells his followers to perform a regimen that will give them superhuman abilities, like climbing icy peaks without proper attire or training--just as Smith did. Reliance and performance by his devoted, paying followers was foreseeable, and so was the harm. Therefore, his monetary relationship and misrepresentation created a duty of care.

Watkins would likely counter this by saying that Smith is an adult capable of making her own decisions, that he should not be held responsible for her poor judgement in exercising her free will, and that creating a duty here would open the gate to a flood of litigation against all public figures. We could counter this by saying that the greater risk is posed to public safety by allowing figures like Watkins to act with impunity. I believe the judge would deny the motion and allow a jury to decide if Watkins was negligent.

The most likely claim for Patel's affirmative duty is a special relationship. Specifically courts recognize a form of special relationship referred to as a joint undertaking. In Farwell, the defendant was determined to have a special relationship with the deceased partially because of their existing friendship and their joint venture that evening, thus there was a duty of care to the deceased once he became injured. Applying that reasoning here, when Patel and Smith decided to climb the mountain together, they entered into a joint undertaking that created a duty of care should harm occur. Thus, when Smith fell and seriously injured herself, Patel had a duty to help her.

Patel would likely argue that there was no special relationship between the two. Unlike in Farwell, the pair had only recently met on a single occasion, which was a strong argument used in Harper. Additionally, Patel could argue that if there was a duty to help, he performed that duty when he gave Smith advice about her breathing technique. Given the facts, it feels likely that a judge would grant the motion in Patel's favor, but this is not a certainty and it could still go to a jury.

Yang likely had an affirmative duty to help Smith because of the undertaking category. In Farwell, the court also relied upon the undertaking category when finding the defendant had a duty. Because the defendant began to help the deceased, he became obligated to continue to help or at least mitigate harm or injury. As seen in the second Restatement section 324, and the third Restatement section 43, courts differ about the level of duty created by an undertaking, and when that duty ceases. The basic concept remains the same however: once you begin to help, there is a duty to continue in some way. When Yang tossed her scarf down to Smith, she intervened in the situation and created a duty; however, what that duty consists of is a different question.

Yang would likely argue that throwing down a scarf is too insignificant an act to create a duty under undertaking, but it feels unlikely that the court would grant the motion based on this fact. I believe this claim will go to trial.

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Patel

Summary judgement would likely be denied for Patel. Under a utilitarian view, people have a duty to help if the action would be good for society and is no inconvenience to them. However, under the default libertarian view, people generally have no duty to help others unless their actions create a risk of harm. If the actions did create a risk of harm, the Defendant has a duty to the Plaintiff unless there are policy reasons excluding liability. If the Defendant's actions did not create a risk of harm, we move to whether there was an affirmative duty which includes special relationship, undertaking, non-negligent injury, non-negligent creation of risk, and statute. Under Farwell v. Keaton, special relationship can be created when two friends are embarking on a joint venture. Under Harper v. Herman, a special relationship turns on whether the Plaintiff was particularly vulnerable and in need or protection. Undertaking requires that once the Defendant has started to help, they are required to help. A defendant cannot leave the Plaintiff in a worse condition than they found them.

We can argue that Patel's actions created a risk of harm because Patel suggested they put their practice to the test. This argument may not succeed because the facts indicate that Smith and Patel both chose to hike up the mountain wearing only swimsuits and without food or water. Aside from suggesting they test their abilities, nothing Patel did put Smith at risk. Moving to affirmative duties, Patel had a special relationship with Smith. In *Farwell v. Keaton*, the court found that two friends embarking on a social venture created a special relationship. Here, Smith and Patel were embarking on a similar venture to hike up with mountain and test their abilities. Therefore, Patel had a duty to help Smith for harm caused from the joint venture.

Patel may argue that under *Harper v. Herman*, Patel did not have a duty to Smith. The court in *Harper v. Herman* focused on the fact that Plaintiff was not particularly vulnerable, or looking to Defendant for protection. Patel may argue that neither of them had been hiking before, and Smith was not particularly vulnerable or in need or protection from Patel. If a court applies the holding from *Farwell*, they will find a special relationship, but if the court applies the logic from *Harmer*, they will find no special relationship.

Smith can also argue that Patel's undertaking created an affirmative duty when Patel said "try taking longer in-breaths." Patel attempts to start helping Smith, then leaves her behind. Longer breaths may have worsened Smith's condition. Therefore, Patel likely had a duty to help once he began giving advice to Smith. Summary judgment would likely be denied.

Yang

Summary judgment will likely be granted for Yang. The above rules from Patel apply here. Here, Yang's action did not create a risk of harm, so we look to affirmative duties. Here, Smith can argue that Yang asking if she was okay and tossing down a spare scarf constituted an undertaking, thus requiring Yang to

help. Just as in *Farwell v. Keaton* where applying ice as an undertaking, tossing down a scarf may also be an undertaking. However, Yang can argue that that was not enough to constitute an undertaking and we don't want to discourage good samaritans from making a small attempt to help if they think it will open they up to liability. Additionally, Yang can argue that she clearly expressed that she could not help by calling the authorities because her phone was running a bit low battery. The court in *Riss v. New York* reasons that the police were very clear that they would not protect Riss, thus lending to the determination that the police did not owe her a duty. Although *Riss v. NY* dealt with with the police, the reasoning can be applied here. Because Yang expressed clearly that she would not help, Smith should not have relied on her help. If we were under a utilitarian approach, we could argue that turning off a podcast is not enough of an inconvenience to not call 911, but the court's default is a libertarian view. Therefore, Yang likely did not owe a duty to Smith.

Watkins

Summary judgment will likely be denied for Watkins because Watkin's actions create a risk of harm. The above rules from Patel apply here. Here, Watkin's actions create a risk of harm. Watkin's promoted their methods to enable people to "endure any environmental conditions." They engaged in publicity stunts that included climbing frozen mountains wearing only a loincloth, and going without sleep, food or water for days on end. At the conference, they declared "nothing can stop you, not the icy peaks of mountains, not the deprivation of food and water." Preaching that people do not need sleep, food, or water and will be able to endure any environmental conditions is highly dangerous and created a risk of harm. Smith hiked up the mountain for the purpose of putting their practice to the test, not because she enjoyed hiking or wanted to appreciate nature. Watkin's method is what caused Smith to hike in icy conditions wearing only a bathing suit without ever hiking before. Further, Watkins was financially benefiting off of Smith. She was a customer. We do not want to encourage companies to profit off of their misinformation. Accordingly, a court will likely find Watkins owed a duty to Smith. The policy basis (crushing liability and social host liability) are not applicable here. If the court did not find Watkin's actions created a risk of harm, Smith could also try to establish a special relationship as customer and provider. Smith was looking to Watkins and their methods for protection against all environmental conditions.

Question 2: Noneconomic Damages & Punitive Damages

I know that I'm getting ahead of myself here thinking about damages, but between you and me this Watkins guy is a real piece of garbage. If we can survive summary judgment and I get the chance to parade his antics in front of a jury, I have no doubt that we'll win the case. I want to know what kind of damages we should be trying to secure.

Please write a short memo analyzing the possibility of securing noneconomic damages and punitive damages. I know that we would be able to get the standard

economic compensatory damages (lost wages, medical bills, and so on), so don't spend your time analyzing that. Some questions that your memo should resolve include: Can we get this charlatan to pay up for all the emotional hardship he put Smith through? What could be considered? Can we recover these damages even though we didn't file a claim for negligent infliction of emotional distress? Can we also get punitive damages? Assuming that the recent allegations against Watkins are true, can we make him pay up for all the other harm he has caused? At this point in time, I don't want you to try to figure out any raw numbers. I just want a better idea of what kind of damages we could get and whether there are any limits on the amount we can recover or issues we need to figure out.

Note that in the state of Loyola, there's no statutory law on punitive damages and there's no governing state case law on either punitive damages or noneconomic damages. Our court may find other states' case law and legal reasoning persuasive.

Because we have other junior attorneys analyzing issues of contributory and comparative negligence, factual causation, and proximate cause, there is no need for you to address those issues within either of your memos.

Prof. Doyle Commentary

The challenge in answering this question was succinctly collecting, organizing, and applying a whole host of rules governing noneconomic damages and punitive damages. The best answers organized the argument in a logical way and walked the reader step-by-step through the various concerns. Students were graded based upon how accurately, completely, and precisely they answered the partner's concerns.

For noneconomic damages, Smith can recover for damages for pain and suffering. It's an open question in the jurisdiction of Loyola whether loss of enjoyment can be a distinct award of damages or whether it should be incorporated within an award for pain and suffering. There's also a question of whether any loss of enjoyment award should be lessened because the Watkins method is helping Smith be happier in her current condition. The jury's damages award will be reduced or vacated only if it "shocks the conscience."

Smith can recover non-economic damages without a separate NIED claim. Some students analyzed how an NIED claim would work in this scenario, but this analysis is not responsive to the question being asked for two reasons: one, the partner has told us that we did not in fact file an NIED claim; and two, we didn't need to file an NIED claim because damages for emotional harm can be recovered in the negligence action that we did file.

Punitive damages are generally not available in cases unless there was gross negligence. There's a credible argument that Watkins committed gross negligence here, given Watkins exhortations for his followers to engage in highly risky behavior without safeguards. Some students used California Civil Code § 3294 from Appendix B as a persuasive authority.

Under the *BMW v. Gore* factors listed in Appendix B, a court reviewing an award of punitive damages must consider (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

For considering reprehensibility, a due process concern for our court is whether the defendant is being unfairly punished for activity outside the case at hand. Similar harm to out-of-state plaintiffs can be considered for reprehensibility but cannot be considered for calculating the amount of the punitive damages award. The court will have concerns about punishing the defendant for potential plaintiffs not involved in this lawsuit and not giving the defendant a proper opportunity to defend himself. Strong student answers wrestled with both the similarity and location of Watkins's conduct that harmed other people. There is question of whether the harm to the other person in Loyola is different than Smith's harm as that person attempted a different physical feat of going without food and water. The harm to people in Oregon was the same as Smith's harm but occurred out of state and therefore cannot be used to calculate damages. The sexual assault claims most likely cannot be factored in the punitive damages calculus at all as they occurred out of state and are dissimilar to the injury that Smith suffered. The defendant cannot be punished for being reprehensible in general.

Under *State Farm* the disparity between punitive and compensatory damages should be a single digit ratio or else the disparity may be a due process violation. Unlike most of the other cases from class, *State Farm* is not a persuasive authority but a controlling authority on the courts in Loyola because it is a Supreme Court precedent on a defendant's constitutional right to due process. There was an opportunity to analogize to *State Farm* and *Mathias* here. From the facts at hand, the current case would not seem to justify a ratio that exceeds single digits as the compensatory damages are meaningful and the fact pattern does not suggest that the defendant's actions are evading review and need stronger deterrence.

From the facts, the difference between punitive damages and civil penalties is not clear. Watkins's allegedly tortious and criminal conduct against women in New York should not be a part of this analysis. We'll have to see if Loyola state law imposes civil or criminal penalties on his actions against Smith.

Some students wove policy concerns to their answers here, particularly by drawing upon the Supreme Court's due process concerns with punitive damages: proportionality, notice, and punishment for actions, not the identity or status of the defendant. A few exams thoughtfully noted that our society is highly protective of freedom of speech and that courts might be reluctant to impose penalties for this kind of activity.

Some student mistakenly included compensatory damages in their punitive damages analysis. Punitive damages are distinct from compensatory damages.

Examples of strong student answers:

In this case, we should pursue compensatory damages for pain and suffering and loss of enjoyment. We should also pursue punitive damages against Watkins for the false claims that led to the injuries of Smith and another convention attendee; however, a court may bar consideration of the Oregon victims, and sexual assault claims against Watkins cannot inform our analysis.

I. Compensatory Damages

In general, compensatory damages are meant to put the plaintiff in the position she would have been in had the harm not occurred. For non-pecuniary damages for pain and suffering or loss of enjoyment, damages amounts are left to the jury. Compensatory damages are assumed reasonable unless they shock the conscience or indicate a jury clearly motivated by prejudice or caprice.

Some courts, such as that of *McDougald v. Garber*, have combined pain and suffering and loss of enjoyment damages on the theory that separating these categories magnifies the arbitrariness of the calculations required to assign a money amount to each. However, the dissent argues that pain and suffering is a subjective category, while loss of enjoyment is objective. By considering these separately, the dissent argues that juries will come to more accurate damages assessments.

Here, Smith endured physical pain and suffering as a result of her injuries and surgeries, as well as emotional pain and suffering. In the latter case, however, the evidence shows that her attitude improved dramatically three months after the incident. This suggests that any calculation of emotional pain and suffering damages could be limited to the three months following her injury. The *McDougald* majority, could truncate potential damages for loss of enjoyment as well. Thus, we should take the dissent's stance, and argue for a separate loss of enjoyment award. After all, Smith will objectively never enjoy her guitar hobby again, and given her new limitations, she will never dance as she did prior to her injuries.

II. Punitive Damages

Punitive damages exist to punish tortfeasors and deter them from future behavior. This is appropriate for situations where a defendant has displayed a pattern of reprehensible behavior, and where compensatory damages are unlikely to discourage him from repeating that behavior in the future. While punitive damages can be much higher than compensatory, they are not unlimited, and may violate due process if they are so high that the defendant cannot be said to be on notice of the consequences of their actions.

There are two standards for assessing the validity of punitive damages. Under the *State Farm* approach, punitive damages beyond a single-digit ratio to compensatory are presumed excessive unless they fulfill a Gore test, which examines 1) the reprehensibility of D's conduct, 2) the aforementioned ratio, and 3) civil or criminal penalties for that conduct. Further, a court may only consider the harm to

the plaintiff in the current case and in the current state in computing punitive damages. Under the *Mathias* approach, higher punitive damages may not be excessive if they are required to punish and deter the defendant.

Here, the State Farm reasoning would bar us from considering Watkins' actions in the allegations of sexual harassment, as well as the cases of similar harm in Oregon. However, beyond these limitations, Smith may be entitled to punitive damages due to the reprehensibility of his false claims, and because Smith's medical bills are unlikely to deter him from continuing to make those claims. Further, we should argue for the Mathias standard to maximize the punitive damages amount available.

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There is great difficulty in determining non-economic damages and how to best forward the restorative justice goal of compensatory damages. There are two main categories of non-economic damages: pain and suffering, and loss of enjoyment of life. These are not based on the type of claim brought, as damages are considered separately once the claim has been ruled on. Courts are divided about whether these two types should be calculated together or separately, and what the best way is to achieve accuracy and equity. In *McDougald v. Garber*, it was argued that pain and suffering is about what the plaintiff is experiencing at that time and will continue to experience, and loss of enjoyment of life is about what the plaintiff will no longer be able to experience. In this case, it might be prudent to argue for separate categories as it seems Smith's pain and suffering diminished relatively rapidly due to the Watkins Method, but her loss of enjoyment will continue indefinitely. Smith will never be able to play guitar again--one of her favorite hobbies--and her enjoyment of her other favorite hobby, dancing, will be limited. Because her pain and suffering took place for a definitive amount of time and the loss of enjoyment of life is ongoing indefinitely, we should argue for separate categories.

Punitive damages present their own set of considerations and are used as a form of deterrence. Courts vary about when they are appropriate but the general rule is that something more than negligence is needed for punitive damages to be properly enforced, with the concern being that damages are generally about restoration rather than punishment. Judge Posner used the phrase "willful and wanton conduct" in his opinion on the *Matthias* case, meaning that punitive damages are appropriate when there is an established pattern of harmful behavior of which the defendant is aware and continues to profit from rather than intervene mitigate the harm. While courts are allowed to account for other claims in examining whether a pattern of conduct has been established, the Supreme Court ruled in *BMW* and *State Farm* that the only conduct permitted to be accounted for in determining amount of punitive damages is that which directly effects the forum state or plaintiff. Following this, the other allegations can be used to establish a pattern but not to determine amount of damages, although the court may consider the other case stemming from the same convention. There are various

guideposts for determining proper amounts of punitive damages, but generally it should be within a single digit ratio to the compensatory damages.

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Part III: ESSAY Questions #3 and #4

You are a junior attorney working at a law firm that is defending a grocery store that has been sued for negligence in the state of Loyola. A partner at the firm is seeking your help with a case. The facts of the case and your work assignment are detailed below.

The plaintiff, Macdonald Miller, recently bought a package of ground beef from our client, Ralph's, a local grocery store chain. After returning from the store, Miller formed the beef into patties that he cooked on his stove to make hamburgers for his family. When biting into a hamburger, Miller broke his tooth on a bone fragment that was approximately one tenth of inch in size.

He is now suing Ralph's for negligence. As is allowed in the state of Loyola, he plans to advance both a res ipsa loquitur case and a negligence case. With regard to res ipsa loquitur, the state of Loyola is a "presumption" jurisdiction, not an "inference" jurisdiction. The case is still at the early stages of litigation, and we'd like your help in strategizing our arguments going forward.

Here is some additional information about Loyola state law, Ralph's meat-grinding processes, industry practices, and regulations that may be worth knowing:

In the state of Loyola, under the doctrine of *respondeat superior*, Ralph's can be held liable for the negligent actions of its employees while those employees are doing their jobs. So for this case, you can consider any negligent action of a Ralph's employee to be a negligent action of Ralph's itself.

Here's how Ralph's meat processing process proceeds. Ralph's receives prepackaged ground beef in four-pound rolls from a meat supplier. An employee at Ralph's removes the meat from the packages, regrinds it, and repackages it for sale. In the typical regrinding process, the meat handler breaks the ground beef into handful-size pieces, visually inspects them, and places them in a grinder. The meat is reground into a "mush," and then machine-compacted through a steel plate perforated by holes up to a tenth of an inch in diameter. The ground beef emerges in the tubular, spaghetti-like strands that consumers all know and love. Although the grinding of the meat is handled by an automated machine, the meat handler stands by to observe the operation from start to finish. The grinder is never left unattended. The reground meat is packaged in styrofoam and sealed in plastic wrap for sale.

The meat grinding machines that Ralph's uses are standard to the grocery industry and can be found in grocery stores across the nation. Some grocery stores grind their meat from whole parts, while other grocery stores regrind meat that has already been ground. Some slaughterhouses process their ground beef through hard-particle removal machines to remove any traces of bone fragments.

Ralph's does not receive its ground meat from a slaughterhouse that uses a hard-particle removal machine. Because hard-particle removal machines are bulky and expensive, most grocery stores and butcher shops do not have them. Of the 10,000 grocery stores in the state of Loyola, 100 Whole Foods premium grocery stores have hard-particle removal machines.

The Fair Labor Standards Act prohibits workers under the age of 18, in non-agricultural occupations, from operating powered equipment considered hazardous, including food slicers and meat grinders. Ralph's had a fourteen-year-old worker operating the meat grinder when Miller's ground beef was ground and packaged.

The United States Department of Agriculture has instructed its inspectors at meat processing plants that no spinal cord or bone tissue is to be allowed in ground beef. The department has also ruled that meat products produced by automatic grinding machines can be labeled as "meat" as long as they do not contain more than 0.15% calcium. The standard allows for trace amounts of bone, although the department's ruling specifies that bones should not be purposefully ground or pulverized by the machines.

Question 3: Res ipsa loquitur

The plaintiff intends to present a res ipsa loquitur case to the jury. We'd like to convince the trial court that the plaintiff should not be allowed to do so.

Please write a short memo that *persuasively* argues that, given the facts of the case, the doctrine of res ipsa loquitur does not apply as a matter of law. Don't write an objective memo that evenhandedly considers both sides. Argue for our client's position. We should be able to present your argument to the court verbatim. Be sure to present our best arguments and address any serious counterarguments.

Prof. Doyle Commentary

Because we covered res ipsa extensively and the rules are straightforward, the exam answers almost uniformly identified the correct issues and rules. As a result, students tended to distinguish themselves on this question based upon their arguments' persuasiveness, credibility, clarity, and organization. The strongest answers also addressed the plaintiff's best counterarguments.

Res ipsa has two requirements. One, the harm must have resulted from the kind of situation in which negligence can be inferred. Two, the defendant must have been responsible for the instrument of harm. Students had the opportunity to make credible arguments about both of these requirements.

For the issue that the harm must have resulted from the kind of situation in which negligence can be inferred, the strongest answers focused *not* upon Ralph's conduct but upon how the injury itself cannot lead to an inference of negligence. Finding a bone in a piece of meat may be a legitimate, natural thing to happen

that does not mean anyone was negligent. The USDA regulations allows for trace amounts of bone in ground meat. Animals have bones and meat. It's not uncommon when eating different kinds meat to have to deal with bones.

The strongest answers grounded their arguments in the procedural context. Res ipsa is a way for the plaintiff to avoid having to make an argument to the jury about the standard of care. A plaintiff should only be allowed to do this in cases in which negligence can already be inferred from the facts: the thing speaks for itself. Any ambiguity or uncertainty works in our favor as defendants. Because one cannot leap to the conclusion that negligence was involved, this ought to be a question for the jury regarding the proper standard of care.

A counterargument worth addressing is that consumers don't expect bones in their burgers. This is not a rotisserie chicken or some other meat product where one commonly finds bones. When eating a hamburger, you only bite down on a cow bone if someone messed up. And just because the USDA says meat products can be labeled as "meat" as long as they do not contain more than 0.15% calcium doesn't mean that defendants should escape tort liability.

The issue of whether the defendant was responsible for the instrument of harm is trickier than it may appear at first. The most straightforward argument for the defense is that the bone came from the slaughterhouse. If there is negligence in this case, maybe the slaughterhouse is at fault or maybe the USDA food inspector is at fault. The ground meat may have passed through the defendant's store, but the defendant did not have exclusive control.

The plaintiffs can counter that once the meat arrived at the supermarket, the defendant had exclusive control. There is no doubt that the consumer is fully in the hands of the grocery store and that the grocery store has a responsibility to regrind and inspect the meat. Even if the harm originated with the slaughterhouse, that should not be enough to let the defendant escape liability.

The most common mistake on these answers was framing arguments around the proper standard of care rather than the specific res ipsa inquiries. With a res ipsa claim, a plaintiff is not arguing about the requisite standard of care that the defendant should have exercised. Arguments about the appropriate standard of care are properly addressed in the next question. The analysis in this question should have been confined to whether 1) this was the kind of injury situation from which negligence can be inferred, and 2) whether the defendant had exclusive control.

Some answers treated the assignment as an objective memo that evenhandedly considered both sides rather than arguing persuasively that the doctrine of res ipsa loquitur does not apply. With this type of question, you should argue on behalf of your client as if you were trying to convince a court that your client should prevail.

Some answers focused on whether Ralph's was the one who introduced the bone into the patty, arguing that they shouldn't be held liable because they weren't initially responsible for the bone being introduced. This is a difficult argument to

connect to the two res ipsa rules. Remember that the second res ipsa rule is about "exclusive control," not exclusive causation.

Some answers conceded that this was the kind of injury situation from which negligence can be inferred. Your job as an attorney is to zealously advocate on behalf of your client. Don't concede a legal issue even if you think that's how you would rule as a judge. Search for a winning angle. You won't win all of your arguments all of the time, but you will lose all of the arguments that you don't make. For this question, the argument is worth making. In real cases that dealt this precise issue, some courts ruled in favor of defendants because a consumer biting on a piece of bone in a piece of ground meat is not the kind of injury situation from which negligence can be inferred.

Examples of strong student answers:

The doctrine of res ipsa loquitur does not apply to this case. For a res ipsa claim to succeed the harm must be the kind that would only occur with negligence and the defendant must be responsible for the instrument of harm.

Here, the harm is not the kind that could only have occurred through negligence. The plaintiff will likely argue that the harm infers negligence on the defendant. However, there are alternative explanations for how the harm could have arisen. Firstly, the USDA has a rule that allows for trace amounts of bone to be present in meat by accident. The existence of this rule suggests that bone often ends up in ground meat for many different reasons and not just because of negligence. In our case, the bone fragment was quite small and could have been in the meat by accident. Unlike in *Byrne*, where it could be inferred that the barrel of flour fell from the flour dealers house because of negligence, here it cannot be inferred that the bone was in the meat due to negligence.

In addition, the defendant was not completely responsible for the instrument of harm. The plaintiff will argue that Ralph's was responsible because they supervised and processed the meat. However, the meat was first in the hands of the meat supplier. Ralph's received the meat pre-ground. The bone could have entered the meat before Ralph's received it. The meat supplier also does not use a hard-particle removal machine, further suggesting that the bone could have entered the meat while with the supplier. Unlike *McDougald*, where the defendant was responsible for the instrument of harm, the tire, at all times when he secured it to his car, here, Ralph's was not responsible for the meat during the whole grinding process. Although Ralph's was responsible for the meat after they received it, they were not responsible for the instrument at all times so res ipsa cannot be used against them.

Therefore, res ipsa does not apply to this case.

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The plaintiff should not be allowed to present a res ipsa loquitur case because a reasonable jury can't find that the harm solely occurred because of negligence or that defendant had exclusive control over the instrument of harm.

Res ipsa is applicable when the harm to plaintiff is the type of harm that only results from negligence and the defendant had exclusive control over the instrument of harm.

Here, a reasonably jury can't find that a bone fragment in ground meat only happened because of negligence. The process ground meat is broken down to stages and is thorough. The meat grinding process has various steps and is regulated by the government. Ralph's ground beef is first processed by a distributor and then Ralph's breaks down the meat into small pieces. A thorough inspection of the meat is performed before re-grinding the meat through a processor with 1/10 in. diameter holes. Per government regulations, there can be small traces of bone that were accidentally left. This government standard of allowing trace pieces of bone demonstrates that when all of the standards and procedures of meat processing are followed, it is common for there to be bone fragments in ground meet in stores across the U.S. when reasonable care is exercised.

Lastly, Ralph's didn't have exclusive control over the instrument of harm (bone fragment). The meat starts out at a distributor before it gets to Ralph's store. Ralph's is not the one who initially strips the meat from the cow and is not responsible for there being bone fragments in the meat. Any bone in the meat is because of the distributor, not Ralph's. The plaintiff will argue that there does not need to be certainty about Ralph's control and that Ralph's did have control when the employee conducted the hand inspection. However, if there was any bone in the meat it was entirely because the distributor left bone in the meat when it processed it. The size of bone the distributor left could have been so small that it could not have been caught in Ralph's inspection of the meat.

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Question 4: Negligence

To prove a negligence case, the plaintiff must identify the specific way that the defendant did not exercise reasonable care. We haven't yet learned what the plaintiff will argue, but in these kinds of cases plaintiffs often present the jury with a variety of ways that the defendant could have acted differently and thereby exercised reasonable care.

Please write a short memo that *persuasively* argues that Ralph's actual behavior met the standard of reasonable care. Don't write an objective memo that evenhandedly considers both sides. Argue for our client's position. Be sure to present our best arguments and address any serious counterarguments.

Because we have other junior attorneys analyzing issues of contributory and comparative negligence, factual causation, and proximate cause, there is no need for you to address those issues within either of your memos.

Prof. Doyle Commentary

This question gave students free rein to assemble reasonable care arguments using the facts of the case and the tools we covered in class: foreseeability, the reasonable person standard, the Hand formula, custom, and statute. There were credible arguments to be made using each of these tools — and many credible counterarguments to defend against.

These answers were judged by how persuasive they were. Persuasive answers were well organized, were grounded within the relevant legal rules, addressed counterarguments, and wrestled with the uncertain application of the law to the facts at hand.

Under the reasonable person standard, Ralph's and its employees must act as a reasonably prudent person would. They are not obligated to exercise perfect care. As far as we know the employee practices should ferret out bones almost all of the time Nothing was left unattended. The meat was inspected and a small bone the exact size of the hole in the grinding machine was able to slip through. Ralph's did employ a fourteen-year-old who was operating the meat grinding machine. Although this employee is a minor, they will be held to same reasonable person standard as an adult because they are engaged in adult activity.

Ralph's can use custom as a shield as their behavior conforms to various industry norms. The plaintiff cannot win a custom argument by saying that Ralph's should have used hard-particle removal machines as these machines are only rarely adopted. The plaintiff also can't win a custom argument by pointing out how some grocery stores grind meat from whole parts. This process might be more likely to introduce bones into the ground meat.

The statutes from the fact pattern are not spectacularly helpful for either side. The USDA guidelines acknowledge that some amount of bone is acceptable. But it is hard for defendants to use this as much of a shield because the guidelines are about the labeling of meat and hardly seem to speak to tort liability. The Fair Labor Standards Act concerns worker safety, not food safety, so the plaintiff will be unable to use it as a sword to show that the defendant was negligent because the statute was designed to prevent a different kind of harm to a different class of people.

There was an opportunity for students to write a back-of-the-envelope Hand formula analysis. On the burden side of the equation, one could analyze the apparent cost of the hard-particle removal machines and the cost of requiring Ralph's employees to engage in a more rigorous meat inspection process. On the probability of loss side of the equation, one could argue that this was a low probability event with low loss or potential loss. A perfectly sized small piece of bone slipped through a meat grinder and resulted in a broken tooth. That's a minor injury from a rare event.

Foreseeability is a bit more subtle of an issue. On the one hand, it is foreseeable that this kind of injury could happen *sometime*. The holes in the machinery allow for a bone fragment of that size to slip through and the various USDA guidelines

let us know that bone particles tend to wind up in ground meat. But as defendants there is an opportunity to narrow the scope of the foreseeability analysis. Like the trolley line case, *Adams v. Bullock*, although a defendant might be able to foresee this injury being possible at some point to somebody under some circumstances, the defendant could not foresee exactly when this problem would happen and protect against this particular instance of that harm occurring.

Examples of strong student answers:

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Ralphs met the standard of reasonable care

The issue at hand is whether or not Ralphs met the standard of reasonable care despite the plaintiff being harmed by a bone found in Ralphs' ground beef. In determining whether Ralph's met the standard of reasonable care, one must look at whether it was foreseeable that the harm would arise, whether a reasonable person would deem the conduct negligent in relation to the reasonable person standard, whether Ralph's conduct was counter to industry custom, whether the cost of precautions is less than the foreseeable harm (Hand Formula), or whether a statute specifies a certain standard of conduct. Although, because this is a case involving a business, which also implicates industry standards, the reasonable person standard is not particularly useful for analysis.

The harm was not reasonably foreseeable

The issue here is whether the harm was foreseeable. An incident which is merely possible is not necessarily foreseeable: Harm which results out of extraordinary circumstances cannot be considered as foreseeable in the eyes of the law (Adams). While the harm that resulted was clearly possible, the case before us is most like Adams v. Bullock, where the court found that the trolley company did exercise reasonable care because the chance that a person would swing a wire on a bridge above the electrified trolley line was considered as extraordinary, and thus too unforeseeable to guard against. Here, the meat had already been prepackaged by another supplier, Ralphs also then regrinds the meat, and the subjects it to visual inspection. The system of visual inspection seems to have worked in the past, and to expect Ralphs to reasonably forsee an accident that

Ralph's conduct was in line with custom

The issue here is whether Ralph's conduct was in keep with industry standards and custom. If an entity or person know of a custom, and yet does not follow it, they can be found as having not exercised reasonable care (Timarco). Here, and unlike in Timarco, Ralphs has adhered to the customs of the industry with regards to ground meat processing. The machines they use are standard to the grocery industry. There is no established grinding protocol in supermarkets, some grind whole pieces while others regrind grown meat. And while other grocery stores use hard particle removal machines, only 100 out of 10,000 grocery stores use them, which amounts to just 1% of all grocery stores, which hardly rises to the level of industry standard. In addition, only Whole Foods, a premium

grocery store, uses those machines, and custom must also be bound within reason. Whole foods and Ralphs occupy different price points and niches, and cannot be expected to follow the same protocols. Ralphs clearly followed the customs of this industry, and for their price point.

The cost of precautions exceeds the probably harm

The issue here is whether Ralph's could be found negligent when applying the hand formula. A defendant may be found to have not exercised reasonable care if the cost of precautions is less than the potential harm resulting from not taking those precautions (Carroll Towing). Here, the Hand Formula cannot be truly operationalized, but using it in a very rough way, to craft a general cost/benefit analysis, it's clear that the cost of buying the "hard particle removers" is high and the potential benefit is small. Injuries resulting from customers biting into shards of bone are exceedingly rare, and the harm resulting from such incidents is minor and nowhere near catastrophic. Because the cost of installing the particle removers is high, and bone chewing incidents are both rare and cause rather negligible harm, Ralph did exercise reasonable care.

Ralphs conduct was in line with statutes

The issue here is whether Ralphs could be found negligent for failing to adhere to statues. Statutes can determine the standard of care, however the statues must be tailored to prevent the harm. Here, The Fair Labor Standards acts, which prohibits workers under 18 from operating power equipment is irrelevant. While the meat grinder who packaged the beef was 14, the statute's intent is to prevent child labor, not to establish reasonable care. And Ralphs has complied with the USDA rules, in that

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The tools used to establish reasonable care are the Hand Formula, Custom, Foreseeability, and Reasonably Person. Hand formula says that if the burden (B) is less than the probability of harm (P) x the magnitude of loss (L), then defendant will be liable for not doing the burden. Custom looks at the industries custom for how it should practice. Foreseeability looks at the reasonable precautions taken for foreseeable dangers, but precaution is not necessary for extraordinary harms. The reasonable person standard is what a reasonable person of ordinary prudence would do under the circumstances. We will not argue statute as it can be used against our client.

Here, the Hand Formula will show Ralph's was within the standard of care. Since 1% of suppliers used the machine, it is likely that the probability of harm is extremely low. Furthermore, the magnitude of harm is at worst a broken tooth. Also, the price of the machine is said to be expensive further implying that B is higher than the PL. It might also cost more for Ralph's to contract a supplier that uses the machine, which also suggest B > PL. Since Ralph's already forms the meat into handful sizes, the burden to go past this is to make the meat into even smaller sizes thus taking longer to package the meat. This would be very meticulous.

Custom will also favor Ralph's. Since only 1% of suppliers use the machine, it likely points to bone fragments not being a problem. It would be very hard to see the bone fragment even if it was the exact size of the hole on the automated machine. Here, Ralph's already practices the custom and even goes further by breaking them into more chunks before grinding again and ordering from a supplier that ships the meat already grounded while some grocery stores grind their meats once from whole parts.

Foreseeability of harm will show that since only 1% of suppliers use the machine, it is likely that even less of people break their teeth from biting a burger. Since this injury in presumed to rarely occur, it would fall within the extraordinary circumstances. Furthermore, there are precautions already taken for larger pieces not to make it through. Thus, the issue here is not that no precaution is taken, as Ralph's goes through more caution, but that this injury is one for extraordinary circumstances.

Finally, the reasonable person standard would suggest that all the actions Ralph's takes is to ensure large pieces of bone does not go through. Again, Ralph's grinds the meat for a second time and even visually inspects the meat forming them into handful sizes. It would be hard for Ralph's to be aware or put on notice of this small bone going through.

Some counter-arguments are for Ralph's to make them into smaller pieces or to use a different supplier. However, the smaller pieces as mentioned before would slow down packaging and be more meticulous for such a low risk of injury & harm. Furthermore, for Ralph's to use a different supplier would likely cost more money to contract with them and there is an

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Ralph's behavior met the standard of reasonable care. Negligence is conduct that breaches the standard of reasonable care. Reasonable care can be determined by tools, such as custom, the Hand Formula, the reasonable person standard, and statute.

Custom is the accepted practice in an industry in which deviation from can mean breach of reasonable care. Here, the practices used by Ralph's were not any that did not align with the accepted custom of meat grinding. They used commonly-used equipment and had an attendant at the machine. Many grocery stores may have operators of these machines with an experience level similar to the grinder here, illustrating reasonable care may have been exercised.

The Hand Formula is an equation that weighs the burden of precaution against the probability of loss times the magnitude of harm. If the former outweighs the two latter, reasonable care may have been exercised. This situation may have been avoided if Ralph's invested in a hard-particle remover, but these machines are expensive and bulky. A Hand Formula analysis shows that the burden of purchasing it outweighs the probability of this type of harm and the magnitude of it, as grinding the meat so finely may only let very small and non-dangerous amounts of bone through. This means that Ralph's may have exercised reasonable care.

Statutes may be used to illustrate reasonable care through their purpose, specifically when a certain class of people is to be protected and a certain type of harm is to be prevented While the defendant's may have violated the statute, this is not detrimental when looking at its purpose. This statute was meant to protect minors from dangerous equipment, and not to protect consumers from getting hurt from bones in their meat. The statute leans in favor of reasonable care being exercised.

The reasonable person standard is an objective standard that details what a person of ordinary prudence would do or not do in similar circumstances. The reasonable person standard illustrates that reasonable care was exercised. Here, no evidence suggests that the grinder was doing anything that did not align with what a person of ordinary prudence would do in his position. They did not leaving the machine unattended, and possibly acted in accordance with the job requirements that Ralph's set forth for them. The grinder being underage may be a non-issue because the defense wouldn't argue that he should be held to a lesser standard.

For these reasons, Ralph’s exercised reasonable care.